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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1605

RICHARD NIXON, *Appellant*

v.

ADMINISTRATOR OF GENERAL SERVICES, ET AL.,
Appellees

On Appeal from the United States District Court for the District of Columbia

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APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

The four briefs filed for the appellees differ in legal emphasis and in style, but they share certain critical misconceptions, on which the appellees have based much of their argument. Our Reply Brief is limited to a discussion of the most important of these erroneous assertions put forward in appellees' papers.

(1) The Proposition That The "Executive Branch" Is A Single Self-Contained Unit.

The Solicitor General's brief offers a short and simple reply to our separation-of-powers argument. The "autonomy of the Executive Branch" is not impaired by the Act, says the Solicitor General, because "the principle of separation of powers does not pre-

vent employees of the Executive Branch from screening materials created by the Executive Branch" (Gov. Br. at 23). Nor is any protected Presidential confidentiality breached by the Act, according to the Solicitor General, because "[t]he privilege for confidential communications does not bar access by the Executive Branch to papers and materials generated by the Executive Branch for the use of the Executive Branch" (Gov. Br. at 32).

The view that this case involves simply an intradepartmental dispute over "Executive Branch" records ignores reality. This case concerns not the documents of the "Executive Branch" at all, but the papers and recorded conversations of the individual who was, for five-and-one-half years, the Chief Executive of the nation. Yet the Solicitor General's brief studiously avoids reference to "the Presidency" or "the Office of the President"—which is, of course, the subject of this litigation, and which distinguishes this case from litigation involving other executive branch units.

The "Executive Branch" consists of thousands of federal employees ranging from the President of the United States to GS-1 clerks and part-time personnel. In this respect, it is not significantly different from the other two branches. The Legislative Branch consists not only of 100 Senators and 435 Representatives, but also of thousands of employees of the Members of Congress and legislative committees. And the Judicial Branch consists of the Chief Justice and Associate Justices of this Court, the judges of the courts of appeal and district courts, judges of other Article III courts, and thousands of judicial employees, including law clerks, bailiffs, and secretaries.

Would the Solicitor General speak as sanguinely of the preserved "autonomy" of the Judicial Branch if Congress decided that all the papers belonging to former Chief Justice Warren were to be reviewed, for ultimate public access, by a senior United States Magistrate in Iowa or Alabama, to be assisted by selected law clerks of senior district judges in other jurisdictions? Would the Legislative Branch's "autonomy" be equally secure if a chief minority counsel of some standing committee and his subordinates were given the statutory task of reviewing all the papers of former House Speaker Carl Albert?

In either of these hypothetical situations,[1] the independent operation of the particular branch would be jeopardized by the intrusion of otherwise unauthorized and unknown individuals into communications that had been presumed confidential. It makes no difference whether the unauthorized individuals are within the same branch of government or outside it. No President of the United States has ever supposed that every conversation in which he engages or every memorandum that crosses his desk becomes immediately available to all employees of the "Executive Branch." Quite the contrary, government simply could not function if such free disclosure within the "Executive Branch" were the rule.

Our argument that the separation-of-powers principle is violated by an Act such as this one does not

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[1] A subcommittee of the National Study Commission of Records and Documents of Federal Officials has proposed that non-private judicial papers become the property of the United States. National Study Commission on Records and Documents of Federal Officials, Subcommittee Proposal, March 7, 1977.

turn, therefore, on the technical question whether Mr. Nixon's documents and tapes will be reviewed by "Executive Branch" employees or by "Legislative Branch" or "Judicial Branch" employees. It turns, rather, on whether Congress can be permitted to impose its judgments upon the internal workings of the Office of the Presidency by subjecting the most confidential of its papers to the close scrutiny of individuals whom the President has not approved. The President is given "the executive power" by Article II of the Constitution, and it infringes that power to have materials that were created in or for the Office of the President screened by anyone *against the wishes of the President in whose administration they were generated,* whether the "screener" be an employee of the executive branch or otherwise.[2]

(2) The Proposition That The Appellant Would Be In The Same Position If President Ford Had Refused To Turn Over The Documents And Tapes.

The Solicitor General analogizes Mr. Nixon's situation to the position he would have occupied if, after his resignation, Mr. Ford had refused to surrender physical possession of the materials to him (Gov. Br. at 24). Although we believe that in those circumstances there would have been substantial alternative bases for Mr. Nixon to claim the materials and to protect their confidentiality (and Mr. Ford's Attorney General apparently agreed with this view), the

[2] The Solicitor General recognizes a flaw in his executive branch approach in that the review panel designated by the proposed regulations to screen Mr. Nixon's tapes and papers will consist of two nonexecutive branch personnel (Gov. Br. at 25 n.10). The Solicitor General dismisses this problem by noting that none of the proposed regulations is at issue in this case.

separation-of-powers aspect of this claim undoubtedly would have been less troubling.

This case, however, does not involve a deliberate decision by a successor President to withhold custody of his predecessor's materials while the new President, or someone he selects, reviews the materials. It concerns, rather, a deliberate decision by Congress to intrude into the operations of the Presidency. The Act removes all discretion from the new President and assigns exclusively to a subordinate executive branch official the task of reviewing a former President's personal recorded conversations and files. Moreover, Congress has kept its hand in the implementation of the Act by requiring the "Executive Branch official" to return to Congress for approval of the regulations he drafts in carrying out his statutory task, a provision even the Solicitor General will not defend here (Gov. Br. at 26 n.11). In fact, the incumbent President has no authority whatever to review the judgment of the Executive Branch official who implements the Act. He—like Mr. Nixon—must sue to prevent disclosures. This case, therefore, hardly resembles the Solicitor General's description of it as one in which Congress has acted simply, "to preserve the Executive Branch's access to executive papers and materials . . ." (Gov. Br. at 25).[3]

[3] Related to the misconception described above is the Solicitor General's disingenuous assertion that the challenged statute is one "*allowing* officials of the Executive Branch to take custody of and examine certain materials generated by the Executive Branch . . ." (Gov. Br. at 11; emphasis added). The Act does not, of course, merely "allow" anything to happen; it *directs* that the Administrator of General Services "*shall* receive, retain, or make reasonable efforts to obtain" the materials to which the Act applies.

The question is *not* whether the Executive Branch will "have access to any of the materials, for any purpose" (Gov. Br. at 16). It is, rather, whether Congress may *compel* the Executive Branch, in a successor administration, to scrutinize and transcribe *all* the President's materials for whatever purposes it thinks sufficient. The separation-of-powers principle is violated in these circumstances because the question of access to Presidential materials necessary for "the business of government" has not been left, as it always previously has been, to arrangements between Presidents. Instead, Congress has arrogated to itself the right to make the rules, and the effect of those rules is to force disclosure of presumptively confidential deliberations of a President.

(3) The Proposition That A President's Constitutional Powers May Be Restricted By The Policies Of A Predecessor Or Successor.

Both the Solicitor General and the private appellees contend that Mr. Ford's approval of this Act and the Justice Department's defense of it during the Carter Administration refute the separation-of-powers argument. These acts, it is said, prove that the Executive Branch favors this legislation and does not view it as an undue interference with Executive functions. Even if we assume that these actions constitute considered Presidential judgments, they do not affect our claim.

The constitutional principles relating to separation of powers cannot be permanently waived by the action or inaction of a particular constitutional officeholder at a particular time. The *Steel Seizure Case* and the many years of litigation concerning the 1867

Tenure of Office Act (discussed at pages 104-105 and 64-66 of our original brief) prove this point. In the *Steel Seizure Case,* Congress acquiesced in President Truman's action and even refused his invitation to take steps to overrule it; nonetheless, this Court held that Congress' legislative prerogative had been infringed. And various Presidents who occupied the Office of Chief Executive during the sixty-year period between the enactment of the Tenure of Office Act and the decision in *Myers* v. *United States,* 272 U.S. 52 (1926), apparently followed the Act's procedures. Yet such acquiescence did not prevent this Court from declaring the 1867 law to be a violation of the separation-of-powers principle.

A rule that would bind one President to policy decisions regarding internal operations of a predecessor or successor would wreak havoc with the Presidency. It is common knowledge, for example, that President Carter initially announced his intention to throw open Cabinet meetings to representatives of the media. He soon abandoned this idea because it inhibited the free flow of candid communication. Could he constitutionally have prescribed an "open meeting" rule for all future Presidents? Or, on a subject touching so intimately on the work-habits of a Chief Executive, could he have urged Congress to enact a law requiring that *all* Cabinet meetings henceforth be held in public notwithstanding the discerned needs of future Presidents? Or could Congress have placed the discretion in the Administrator of General Services to decide which Cabinet meetings should be opened? We submit that each President must be permitted to set his own rules on subjects so closely related to the implementation of the "executive power" conferred by the Constitution.

Even if President Ford's decision to sign the legislation and President Carter's failure to voice opposition to it constitute some evidence that they disagree with former President Nixon's assessment of the impact of the Act upon the operations of the Presidency, their reactions must be judged in light of the special circumstances facing them. First, President Ford would have encountered obvious difficulties if he had vetoed this legislation, after having been sharply attacked for issuing a pardon, and President Carter would doubtless be roundly criticized for speaking against the Act, after having campaigned for "open government." Second, this Act deals only with Mr. Nixon's materials. Even on the unlikely chance that such indiscriminate legislation will be enacted with respect to the materials of later Presidents, as contrasted to the watered-down versions being suggested by the Title II Commission, they might still be able to structure their files so that an act having only prospective application would not prove detrimental to their interests.[4] Third, and most important, the Ford and Carter views jointly represent little more than two-and-a-half years of experience in the presidential office. Weighed against these views are those of earlier Presidents such as Johnson, Eisenhower, Truman and Hoover, all of whom imposed significant limitations upon access to materials they considered to be confidential. Indeed, President Ford has already demonstrated his concern about unwarranted disclo-

[4] This factor is particularly relevant with respect to what the Reporters Committee calls President Ford's "voluntary compliance" with the terms of the Act (Rep. Comm. Br. 37). President Ford's staff members maintained their files for two years in light of the possibility that similar legislation might be enacted.

sure of confidential materials by imposing a fourteen year access restriction on a variety of his papers, including all items containing confidential communications with his advisers during his tenure as a member of Congress, as Vice President and as President.

(4) The Proposition That This Case Presents Largely Hypothetical Issues.

Reiterating the position they advanced in their motions to affirm, the appellees urge this Court to refrain from deciding issues "based upon hypothetical possibilities" (Gov. Br. at 14). The appellees contend that this appeal is premature because the "public access regulations" governing public disclosure of the appellant's materials have not yet been implemented. As we noted in our initial brief, however, the Act has a variety of immediate and concrete effects on Mr. Nixon's rights, including the following:

(a) The Act unilaterally abrogates a contract entered into by the government which, if specifically performed, would guarantee appellant various rights with respect to these materials.

(b) The Act directs a group of government archivists, lawyers, and stenographers to review, categorize and analyze every recorded word spoken by the appellant and those who talked with him during a two-and-a-half year period.

(c) An official, appointed by a Democratic President and confirmed by a Democratic-controlled Senate has been delegated the discretion to determine which political files of a Republican President will be disclosed to the general public; and

(d) Executive branch-wide access to the appellant's White House files has been authorized for any "lawful Government use."

None of these effects of the Act depends in any way upon the content of the public access regulations. Moreover, regardless of what those regulations may provide, the issues of whether the appellant has been subjected to a bill of attainder, and whether government review of his conversations and files violates his rights of privacy and free speech are squarely and immediately presented by the Act itself.

Beyond these immediate consequences is the probability—recognized as not more than a possibility by the Solicitor General—that reserving these questions for future resolution would doom Mr. Nixon to the status of a "continual litigant" (Gov. Br. at 44 n. 29). We noted in our original brief that this is not a case in which many individuals may be expected to shoulder the burden of future litigation; there is one person, and one person only, who will be forced to bear the burden of lawsuit after lawsuit. It is simply wasteful and unjust to relegate him to this status in the fond hope that the constitutional infirmities that infect the Act will somehow be cured by the promulgation of restrictive public access regulations.

(5) The Proposition That Presidential Access For "Current Government Business" Justifies This Act.

Although Congress enacted this legislation amid much discussion of the historical interest in the record of the Nixon Presidency, there is at this stage almost no mention of that subject in the Solicitor General's brief or in those of the private appellees.

The likely reason for the omission is not hard to draw: Whatever historical interest there may be in the papers reflecting the internal operations of a President's office is present, to at least the same degree, in the papers reflecting the internal operations of this Court. The same rationale that sustains this Act would thus require that a similar seizure of judicial documents by legislative enactment also be upheld.

In resisting this "judicial analogy" the Solicitor General argues that the Presidency is different from this Court because "information and lessons" gained from the experience of one President are needed in succeeding administrations (Gov. Br. at 27-28 n. 12). Viewing the Act in this light, the Solicitor General contends that the Court need only decide "whether Executive Branch employees may have access to papers and other materials accumulated during appellant's terms of office, either to screen the papers and materials for the purposes set forth in the Act or *to use them to the extent necessary in carrying out their executive responsibilities*" (Gov. Br. at 24-25, emphasis added).

This argument loses its force, however, in light of facts in the record showing that the "need" for Presidential materials is largely illusory:

(1) In the nearly three years since Mr. Nixon resigned, there has never been an occasion for the Executive Branch to request access to his tape recordings for "current government business."

(2) The Special Prosecutor's need for investigative materials has been satisfied without invoking the Act at all.

(3) There was no evidence submitted to Congress that this Act was needed to facilitate the current business needs of the Executive Branch.

(4) The only instance cited by the government to the district court relating to the new administration's need for access pertained to one file room of Mr. Nixon's National Security Council files.

(5) President Ford's deposit of his presidential materials authorizes access for "current government business" only to the incumbent President, his Counsel, or such other White House personnel as are specifically designated by the President's' Counsel.[5] Executive Branch-wide access, in accordance with the Solicitor General's view, has been prohibited by President Ford.

Much as the appellees belabor the few incidents in our history when Presidents were obliged to secure from their predecessors copies of documents that were needed for "ongoing government business," they simply cannot make this Act fit the narrow scope of that need. Instead, the Act sweeps up *all* Presidential materials, not just those likely to be needed by subsequent administrations, and it makes those materials available to any Executive Branch officers, not just to the Office of the President. Plainly, the "ongoing government need" hypothesis is *post-hoc* rationalization that ill describes the Act it is meant to justify.

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[5] With this restriction go the further requirements that the request must be in writing from the President's Counsel with a copy to President Ford or his agent; that it must describe with specificity the material required; that it must state that the information is unavailable from any other source; and that it must include a commitment to return all copies when they are no longer needed.

(6) The Proposition That Only Incumbent Presidents May Claim Presidential Privilege.

The private appellees continue to press their argument that a former President has no standing to resist disclosure of his private deliberations while in office, or that, at minimum, his claim is entitled to little weight. Significantly, they choose not to discuss the instance in which President Truman, after leaving office, was forced to invoke the separation-of-powers principle on his own behalf to preclude a politically motivated inquiry by a hostile Congress into his conduct as President. Under the private appellees' theory, Mr. Truman would have had no choice but to submit, unless his successor decided to shield him. The theory is erroneous, as the Solicitor General acknowledges.

The private appellees apparently do recognize that there is a distinction between a privilege based upon a relationship of confidentiality and a privilege—such as the one involved in *United States* v. *Reynolds,* 345 U.S. 1 (1953)—which rests upon the secret nature of the information that would be disclosed (Rep. Comm. Br. 28-29). Their principal argument against recognition of a privilege of confidentiality is that certain documents—such as a confidential memorandum to the President from the Joint Chiefs of Staff—might be subject to *both* privileges. But it is common in the law that a single document or communication might be protected by separate testimonial privileges, and that even if one privilege is waived, the other remains. Consequently, if a successor President determines that a memorandum from the Joint Chiefs of Staff to his predecessor need no longer be kept secret because its subject is no longer sensitive, the earlier President may still feel that the confidential nature of the com-

munication warrants continued protection. That independent interest is precisely what was recognized in this Court's opinion in *United States* v. *Nixon,* 418 U.S. 683 (1974), and it applies here.

Nor is that interest diminished, as the Solicitor General suggests, if it is Executive Branch personnel in a succeeding administration who want access. The argument that former Presidents have no protection against intrusions by subsequent executive branch officials necessarily disregards both tradition and the logic of the privilege. New Presidents and their staffs have never had *carte blanche* access to the confidential files of their predecessors. Nor have they needed it. To this day, for example, tape recordings of conversations of Presidents Kennedy and Johnson remain restricted from *all* access by the Executive Branch.

Similarly, except within narrow, well-defined areas, a successor administration has no greater or more legitimate interest in the confidential materials of a prior administration than does the public generally. For example, there is no justification for the incumbent Carter Administration to have access to former President Ford's internal political staff discussions concerning his choice of Robert Dole for a running mate. But on the logic of the Solicitor General's present position, President Ford would have no alternative but to permit such access to any Executive Branch employee who desires it. To be sure, in the area of foreign relations and national security, disclosure might ordinarily be warranted, and for that reason Mr. Nixon has never objected to providing access to the National Security Council files if the incumbent President decides it is needed. In other areas, however, the same principles of confidentiality that bar disclosure of materials to the public generally, protect them from disclosure to future administrations.

(7) The Proposition That The Privacy Argument Is Premature And That The Archivists Are "Discreet."

The principal argument made by the appellees on the invasion-of-privacy issue is that Mr. Nixon should wait to see how the Act is administered by the Executive Branch officials before charging that it invades his privacy. The grounds invoked by the district court to sustain the constitutionality of the Act against Fourth Amendment claims are expressly repudiated by one set of appellees (ACLU Br. at 15) and discretely unmentioned by the others.

After all this well-meaning advice that he wait for some future salvation and repeated exhortations that his claims are premature, Mr. Nixon is left with the following immediate prospect: Absent this Court's intervention, all his personal papers and recordings of two-and-a-half years of conversations in his office and on various residence telephones will be subjected to meticulous scrutiny (see the charts at pp. 36-37 of our original brief) by a band of "archivists" whom he has no reason to know or trust. The "archivists" are not his employees and owe no loyalty to him; they are government officials employed by the National Archives, which is seeking to become an independent agency with no executive branch tie to support the Solicitor General's separation-of-powers argument.

On the ground that the archivists have an "unblemished" record, the appellees argue that the invasion of privacy involved in their review is permis-

sible.[6] But this argument overlooks the fact that the archivists are government employees subject to the direction of a government official who has gone on record as favoring broad public dissemination of the papers of high-ranking officials. Moreover, the same group of archivists—whose disinterest is essential to the appellees' position—have volunteered their services to Warner Communications, Inc., and the three major networks as part of the proposed plan to make commercial reproductions of those Presidential tapes that have been played in open court. See *Nixon* v. *Warner Communications, Inc.*, No. 76-944, cert. granted, March 28, 1977. Just as it is not remotely conceivable that an otherwise unconstitutional wiretap or other electronic surveillance might be upheld simply because the government employees doing the job were "professional and discreet," the intrusion accomplished by this Act must similarly be invalidated.

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[6] The Solicitor General quotes from the testimony of Dr. Herman Kahn to prove that the archivists have protected confidentiality in the past (Gov. Br. at 52 n. 35). In fact, the quoted material proves only that they secured the papers of outgoing Presidents against anyone "lay[ing] hands on them who might do them harm"—not that confidences were protected.

There is no evidence in the record here to sustain the district court's conclusions concerning the disinterest of the archivists. That factual issue was not raised by the pleadings below. It appeared as an argument in the appellees' briefs and was accepted as fact by the district court. In light of the silence of the record in this regard, appellant requested an evidentiary hearing on the question of archivist bias. The district court denied that request. Order of March 25, 1976, denying Plaintiff's Motion to Protect the Status Quo Pending Appeal.

(8) The Proposition That The Act Raises No Fourth Amendment Problems.

The Solicitor General contends that because the appellant's materials are in the "lawful possession of the United States," a complete search of those materials does not violate the Fourth Amendment (Gov. Br. at 52-53). Yet both the factual premise and the legal argument on this point are erroneous. Mr. Nixon left the White House with directions to forward his materials to San Clemente. When the Special Prosecutor requested that the documents temporarily remain in the White House, the appellant entered into a contract with the government that covered custody, control and disposition of the materials. This contract was unilaterally abrogated by the Act, which directed the General Services Administration to seize the tapes "[n]otwithstanding any other law or any agreement or understanding." Section 101(a), (b)(i). Because the appellant's right to possession of the materials was frustrated by the very Act challenged here, we take strong issue with the Solicitor General's assertion that the government's possession is lawful.

Even if the government's present custody of the materials is somehow considered "lawful," however, the fact that the appellant does not have custody of the materials does nothing to destroy his reasonable expectation of privacy with respect to those materials. If the Solicitor General is correct that property in the hands of government officials on government premises may be searched without implicating the Fourth Amendment, then the government could freely search all first-class mail without running afoul of the Fourth Amendment, a contention that this Court

rejected almost a century ago. *In re Jackson,* 96 U.S. 727 (1878).

The district court expressly held that the appellant enjoyed a reasonable expectation of privacy in the confidential materials at issue in this case, a holding that renders inapplicable the discussion in *Couch* v. *United States,* 409 U.S. 322, 335-36 (1973). Moreover, the Solicitor General's reliance on *Andresen* v. *Maryland,* 427 U.S. 463 (1976), ignores the fact that a valid search warrant was issued in that case, describing with particularity evidence relevant to the commission of a crime. Indeed, the Court's description in that case of an unconstitutional general warrant as a "general, exploratory rummaging in a person's belongings" would fit very well the wholesale seizure of materials effected by the present Act. Finally, the suggestion that the search authorized by the Act is analogous to a permissible "inventory search" is disingenuous in the extreme. Warrantless inventory searches have been held valid only in narrow circumstances, see *South Dakota* v. *Opperman,* 96 S. Ct. 3092 (1976), and the processing, review and ultimate disclosure contemplated by this Act far exceeds what could fairly be deemed a search conducted for proper "inventory" purposes.[7]

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[7] The Solicitor General's further contention that there is an exception to the general principles of the Fourth Amendment for searches of papers and other materials of public officials is reminiscent of his similar argument earlier this term that there is a broad exception to the Fourth Amendment that allows warrantless intrusions into privacy to facilitate the enforcement of the tax laws. *G.M. Leasing Corp.* v. *United States,* 97 S.Ct. 619, 629 (1977). The Court flatly rejected that effort to create a novel "exception" to the Fourth Amendment, and it should do the same here.

(9) Miscellaneous Misreadings Of The Act And Of Appellant's Arguments.

In a variety of ways, the appellees have attempted to ease their task of defending the Act by simply misreading it. For example, the Solicitor General states, "Under the Act, appellant receives, on request, a copy of any of the materials that have been impounded" (Gov. Br. at 14). There is no such provision in the Act. The district court evidently thought such a right would be a good idea, and the court temporarily created it in its injunction pending appeal. But that right will vanish with the dissolution of the district court's injunction, a fact that the Solicitor General has failed to mention.

The Solicitor General asserts that section 104(a)(5) of the Act *guarantees* appellant all of his privileges" (Gov. Br. at 16, emphasis added). The actual language of the Act, however, is that the Administrator shall promulgate public access regulations that "shall take into account [among six other factors] . . . the need to protect any party's *opportunity* to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials." Section 104(a) (emphasis added). This provision shifts to appellant the burden of contesting any decision concerning public disclosure with which he disagrees.

Finally, the Solicitor General states that ". . . the Act, on its face, provides for the return of private materials to appellant." The Act, in fact, has no such provision. With respect to the appellant's private materials, the Act provides only that the public access regulations "shall take into account the need to give

to Richard M. Nixon, or his heirs, tape recordings and other materials which are not likely to be related to the need [to provide the public with the full truth . . . of Watergate] and are not otherwise of general historical significance." Section 104(a)(7) (emphasis added).

In like fashion, in their effort to refute various arguments we have advanced, the appellees have mischaracterized our position on several important issues. For example, the Solicitor General contends that our argument is similar to those that were advanced and rejected in *United States* v. *Nixon,* 418 U.S. 683 (1973). Quite the contrary, we have argued that this Court's decision in *United States* v. *Nixon* provides the most compelling basis for invalidating the Act. There, this Court determined that in order to rebut the presumption of confidentiality afforded a President's deliberations, the party seeking disclosure must make a preliminary showing of compelling need for specific materials or communications. Here, Congress has enacted legislation that authorizes the Administrator and his staff to review the entirety of a President's files and two-and-a-half years of his recorded conversations, with no preliminary showing of compelling need as to any specific items.

The Solicitor General further characterizes our position as suggesting that appellant is to be "the only judge" with respect to claims of privacy or privilege. That is not so. Instead, we have argued that if there is justification for a specific intrusion into presidential confidentiality, the lawful mechanism is to issue a subpoena for production of particular materials. If the interests requiring disclosure are shown to be sufficient to the satisfaction of the court, dis-

closure is permissible, even over a claim of privilege. But the proper procedure is not to enact sweeping legislation seizing all of the appellant's papers and effects over a five-and-a-half year period on the ground that some of those materials may be needed at some time by some persons in some future administration.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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